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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

WADE ROBERTSON,

Plaintiff and Appellant, **A148504**

v. **(San Mateo County Super. Ct. No. CIV530382)**

HEARST CORPORATION et al.,

Defendants and Respondents.

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From time to time, this court has encountered difficult cases concerning the scope and application of the anti-SLAPP (strategic lawsuit against public participation) statute. (Code Civ. Proc., § 425.16.)[1] This case is not one of them. On September 7, 2013, the San Francisco Chronicle ran an article entitled "State Bar judge recommends lawyer be disbarred." The lawyer was Wade Robertson (Robertson), who sued the newspaper's owners, related entities, and various employees (collectively, Defendants), asserting one cause of action for defamation. Defendants filed special motions to strike the complaint under the anti-SLAPP statute. The trial court granted the motions. Robertson appeals. We affirm.

FACTUAL AND PROCEDURAL HISTORY

We summarize the facts relevant to the issues on appeal.

[1] Unless noted, all further statutory references are to the Code of Civil Procedure.

The State Bar Court Decision

After a nine-day hearing in 2013, the State Bar Court filed a 28-page decision recommending Robertson's disbarment. The decision includes extensive findings of fact. The State Bar Court found Robertson persuaded William C. Cartinhour, Jr. (Cartinhour), a 77-year-old Maryland resident, to finance the expenses of a pending federal class-action lawsuit in return for a percentage of the recovery. Robertson formed a District of Columbia partnership, with Robertson and Cartinhour as the partners.

Between September 2004 and April 2006, Cartinhour contributed $3,500,000 to the partnership. Instead of using Cartinhour's contributions to fund the lawsuit, Robertson used the money to finance personal investments. In April 2005, Robertson withdrew $1,970,000 from the partnership bank account, and used the money for securities trading. In July 2005, Robertson incurred significant trading losses, losing most of the money.

Robertson failed to disclose to Cartinhour that the class-action lawsuit was dismissed in May 2005. In June 2005, Robertson informed Cartinhour that "all continues 'on track'" and " 'there is nothing substantively new to report with the case.' " In March 2006, he told Cartinhour " 'I am confident that our position continues to grow stronger and that we will ultimately be wildly successful in this endeavor.' " In May 2006, the Second Circuit Court of Appeals affirmed the dismissal of the class-action lawsuit.

In April 2006, Robertson persuaded Cartinhour to sign a number of documents, including a document entitled " 'Indemnification, Hold Harmless, and Agreement to Waive all Claims.' " In April 2007, Robertson withdrew a further $1,435,000 from the partnership bank account, and transferred the money into his personal trading account. By the end of January 2008, Robertson sustained options trading losses of more than $850,000. According to the State Bar Court's decision, Robertson has not repaid the money he withdrew from the partnership, or paid back any funds to Cartinhour.

In early 2009, Cartinhour requested an accounting of the partnership funds, and the return of his $3,500,000. In August 2009, Robertson filed a civil complaint for declaratory relief against Cartinhour in the United States District Court for the District of

Columbia, alleging Cartinhour's demands for money breached the April 2006 indemnification agreement. Cartinhour answered the complaint and cross-complained against Robertson.

In February 2011, a federal jury found Robertson liable for legal malpractice and breach of fiduciary duty. The jury found the "Hold Harmless" agreement invalid and unenforceable. They awarded Cartinhour $3,500,000 in compensatory damages, and the same amount in punitive damages. In April 2012, the District of Columbia Circuit Court of Appeals affirmed the judgment, stating " '[i]n this case where, in spite of the fiduciary duty Robertson owed Cartinhour as his business partner, Robertson misled the elderly and unhealthy Cartinhour into believing all was " 'on track' " with the litigation well after the case had been dismissed, we have no trouble upholding the jury's finding.' "

The State Bar Court also found Robertson utilized a bankruptcy court proceeding to delay his obligation to pay the damages owing to Cartinhour. In May 2012, the bankruptcy court sanctioned Robertson for advancing frivolous arguments.

Based on these findings of fact, the State Bar Court concluded Robertson "engaged in a scheme to defraud through misrepresentations and omissions of material fact, which resulted in the systematic misappropriation of millions of dollars[.] By engaging in the scheme to defraud Cartinhour and by misappropriating Cartinhour's funds, [Robertson] committed acts involving moral turpitude, dishonesty, and corruption in willful violation of section 6106 [of the California Business and Professions Code]." The State Bar Court also concluded Robertson abused the litigation process in the bankruptcy proceeding, in willful violation of section 6106. The State Bar Court noted Robertson "has shown no remorse or recognition of the serious consequences of his misbehavior," and found that "the interests of public protection require a recommendation of disbarment[.]"

The Newspaper Article

On September 7, 2013, three days after the State Bar Court's decision, the San Francisco Chronicle ran an article entitled "State Bar judge recommends lawyer be disbarred." It stated: "A State Bar judge has recommended disbarment of a Bay Area

attorney after a jury found he had cheated an elderly client out of $3.5 million." The online version of the article included a header caption indicating the article appeared in the "Crime" section of the newspaper's website.

The Underlying Litigation

Based on the article, in September 2014, Robertson filed a complaint, asserting one cause of action for defamation and defamation per se. Robertson alleged three of the newspaper's statements were defamatory. First, he alleged it was false for the newspaper to state he " 'cheated' " an elderly client " 'out of $3.5 million.' " Second, Robertson alleged the article made the false factual allegation that he was " 'suspended . . . from law practice.' " Third, Robertson complained the online version of the article included "a large header caption that read: **'Crime.**' " when he "has never been charged with any crime . . . anywhere." Robertson alleged the newspaper refused to retract the article, which caused him to suffer injury and damage to his business and goodwill, and that he was also entitled to punitive damages.

The Special Motions to Strike

In response to Robertson's complaint, Defendants filed two anti-SLAPP motions; one on behalf of the entity defendants, and one on behalf of the individual defendants.[2] Robertson opposed the motions. Defendants filed a single reply brief, and a request for the court to take judicial notice of four documents, including the State Bar Court decision. Robertson filed objections to Defendants' request for judicial notice.

In January 2016, the trial court held a hearing on the motions. Finding that the two anti-SLAPP motions were "virtually identical," the court addressed them together.

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[2] Defendants initially filed one anti-SLAPP motion. Robertson filed a motion to strike it, which the trial court granted in part and denied in part, finding defaults had been entered against the individual defendants, but not the entity defendants, at the time the anti-SLAPP motion was filed. On the same day, the trial court vacated the defaults of the individual defendants. The individual defendants refiled their anti-SLAPP motion, and the parties stipulated that both anti-SLAPP motions would be heard together. Robertson separately appealed the trial court's order vacating the defaults of the entity defendants, but we summarily dismissed this appeal. (*Robertson v. Hearst Corp. et al.*, A147519.)

First, the trial court found Defendants had "sufficiently demonstrated that the sole cause of action for defamation arises from protected activity in publishing a newspaper article reporting on State Bar Court proceedings and a federal civil court case. This activity falls within the statute – CCP §§ 425.16(e)(2), (e)(3), and (e)(4)." Second, the trial court found Robertson "failed to meet his burden of demonstrating a probability of prevailing on the claim." The trial court granted Defendants' request for judicial notice and overruled many of Robertson's evidentiary objections.

DISCUSSION

On appeal, Robertson contends Defendants did not demonstrate their conduct "fit one of the categories listed in section 425.16, subdivision (e) . . . ." Robertson also argues the trial court erred in finding he "failed to make the minimal showing of possible merit for the complaint." We disagree and affirm. [3]

I.

Governing Law and Standard of Review

Section 425.16 authorizes a defendant to file a special motion to strike when a cause of action arises from "any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue . . . ." (§ 425.16, subd. (b)(1).) The purpose of the statute is to curb the chilling effect certain litigation may have on the valid exercise of the rights of free speech and petition for the redress of grievances, and courts interpret the statute broadly to accomplish that goal. (§ 425.16, subd. (a).)

There are two prongs to the anti-SLAPP analysis. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76.) "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. [Citation.] 'A defendant meets this burden by demonstrating that the act

[3] After Defendants filed their appellate brief, Robertson moved to strike it, claiming Defendants "manufactured" facts, and referred to matters that occurred after the entry of judgment, including the California Supreme Court's disbarment of Robertson. In a prior order, we deferred ruling on this motion. We now deny it. In affirming the trial court's order, we have not relied upon matters outside the record on appeal.

underlying the plaintiff's cause fits one of the categories spelled out in section 425.16, subdivision (e)' " (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.) Second, the plaintiff " 'must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.' " (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820.) We review orders granting or denying a special motion to strike de novo. (*Contreras v. Dowling* (2016) 5 Cal.App.5th 394, 405.)

II.

Robertson's Cause of Action for Defamation Arises from Protected Activity

Under the first step of our anti-SLAPP inquiry, we have little difficulty concluding the publication of the newspaper article about a State Bar Court decision constitutes protected activity. An "'act in furtherance of a person's right of petition or free speech . . .' includes: . . . (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law." (§ 425.16, subd. (e).) The newspaper article falls squarely within the ambit of subdivision (e)(2).

Newspaper articles are writings made in connection with an issue under consideration or review by an official proceeding authorized by law when they report on or describe the official proceeding. (*Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 37 Cal.App.4th 855, 863 (*Lafayette Morehouse*).) An official proceeding is authorized by law when it is "established by statute." (*Philipson & Simon v. Gulsvig* (2007) 154 Cal.App.4th 347, 358.) California's Business and Professions Code provides that the State Bar's "board of trustees shall establish a State Bar Court, to act in its place and stead in the determination of disciplinary and reinstatement proceedings . . . ." (Bus. & Prof. Code, § 6086.5; see *In re Rose* (2000) 22 Cal.4th 430, 438−441.) Because State Bar disciplinary proceedings are established by statute, there can be no doubt that a

newspaper article about a State Bar Court's decision is a writing about an "official proceeding authorized by law."[4] (§ 425.16, subd. (e)(2).)

In arguing otherwise, Robertson contends "[f]alse accusations of criminal conduct are not protected under the anti-SLAPP statute[.]" Robertson relies primarily on *Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122, but his reliance on *Weinberg* is misplaced. In *Weinberg*, there was nothing in the record to suggest the defendant's conduct fell within the second category set forth in section 425.16, subdivision (e). (*Id.* at p. 1130.) Moreover, "whether or not . . . statements were false does not determine whether they constitute protected activity for purposes of the SLAPP statute." (*Haight Ashbury Free Clinics, Inc. v. Happening House Ventures* (2010) 184 Cal.App.4th 1539, 1549.) Instead, subdivision (e)(2) of section 425.16 pertains to "*any* written or oral statement or writing made in connection with an issue under consideration or review by . . . [an] official proceeding authorized by law[.]" (Italics added.)

An exception to the reach of subdivision (e) arises where "the defendant concedes the illegality of its conduct or the illegality is conclusively shown by the evidence" (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 316 [defendant's conduct was criminal extortion as a matter of law]). That exception does not apply here. While Robertson contends the newspaper article defamed him by falsely accusing him of committing a crime, if "a factual dispute exists about the legitimacy of the defendant's conduct, it cannot be resolved within the first step [of the anti-SLAPP analysis] but must be raised by the plaintiff in connection with the plaintiff's burden to show a probability of prevailing on the merits." (*Ibid.*)

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[4] Prior to oral argument, by order dated May 17, 2018, we asked the parties to focus on subdivision (e)(2) and cited *Lafayette Morehouse*. On the afternoon before argument, Robertson moved for leave to file a supplemental brief on "whether or not the publication by the Defendants which underlies Plaintiff's claim in this action qualif[ies] for protection under California Code of Civil Procedure § 425.16, subd.(e)(2)[.]" The motion is denied.

Robertson argues his "reasonable confidentiality and privacy rights in ongoing non-final administrative attorney-disciplinary proceedings against him" demonstrates the newspaper's statements "were not properly 'in connection with' those proceedings." Robertson's suggestion that the State Bar Court proceedings were private or confidential is spurious. "Once the State Bar initiated disciplinary proceedings . . . , the records of those proceedings became public. (Bus. & Prof. Code, § 6086.1, subd. (a).)" (*Mack v. State Bar of California* (2001) 92 Cal.App.4th 957, 961.)

Next, relying on *Contemporary Services Corp. v. Staff Pro Inc.* (2007) 152 Cal.App.4th 1043 (*CSC*) and *Fremont Reorganizing Corp. v. Faigin* (2011) 198 Cal.App.4th 1153 (*FRC*), Robertson suggests that statements are made in connection with an issue under consideration or review by an official proceeding only if "the statements were directed to persons having some interest in the proceeding." But *CSC* and *FRC* are distinguishable because neither case concerned a newspaper's publication of an article about a recent court decision. By definition, newspaper articles about a proceeding are directed to a wider audience than persons having some involvement in the proceeding. Because Defendants' newspaper article reports on, and describes, the State Bar Court's decision recommending Robertson's disbarment, it falls squarely within section 425.16, subdivision (e)(2).[5]

III.

Robertson Cannot Establish a Probability of Prevailing on his Defamation Claim

Robertson contends he established "a prima facie case for his claim of defamation." Defendants argue Robertson cannot establish a probability of prevailing on

[5] Based on our conclusion that publication of the newspaper article constitutes protected activity under section 425.16, subdivision (e)(2), we do not address Robertson's dubious contention that the State Bar Court's decision was not a matter of public interest. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1113 [if defendant shows the cause of action arises from protected activity under section 425.16, subdivision (e)(2), then defendant is not required to separately demonstrate the statement was made in connection with a public issue].)

his defamation claim because "California confers an absolute privilege on communications that fairly summarize official proceedings." We agree with Defendants.

A. *Robertson's Defamation Claim Is Barred By the Fair and True Reporting Privilege*

"The tort of defamation 'involves (a) a publication that is (b) false, (c) defamatory, and (d) unprivileged, and that (e) has a natural tendency to injure or that causes special damage.' " (*Taus v. Loftus* (2007) 40 Cal.4th 683, 720.) Civil Code section 47 provides, in pertinent part, that "[a] privileged publication . . . is one made: [¶] . . . [¶] (d)(1) By a fair and true report in . . . a public journal, of (A) a judicial, (B) legislative, or (C) other public official proceeding, or (D) of anything said in the course thereof . . . ." The fair report privilege, if applicable, bars claims for defamation. (*J-M Manufacturing Co., Inc. v. Phillips & Cohen LLP* (2016) 247 Cal.App.4th 87, 98 (*J-M Manufacturing*).) When "there is no dispute as to what occurred in the . . . proceeding reported upon or as to what was contained in the report," whether the fair report privilege applies is a question of law. (*McClatchy Newspapers, Inc. v. Superior Court* (1987) 189 Cal.App.3d 961, 976 (*McClatchy*); accord *J-M Manufacturing*, *supra*, 247 Cal.App.4th at p. 99.)

" 'Fair and true' in this context does not refer to the truth or accuracy of the matters asserted in the . . . proceedings, but rather to the accuracy of the challenged statements with respect to what occurred in the . . . proceedings." (*Healthsmart Pacific, Inc. v. Kabateck* (2016) 7 Cal.App.5th 416, 434 (*Kabateck*).) Such accuracy is measured by the publication's natural and probable effect on the mind of the average reader. (*Kilgore v. Younger* (1982) 30 Cal.3d 770, 795.) A degree of "flexibility" and "a certain amount of literary license" is tolerated in deciding what constitutes a fair report. (*McClatchy*, *supra*, 189 Cal.App.3d at p. 976; *Jennings v. Telegram-Tribune Co.* (1985) 164 Cal.App.3d 119, 122, 127 [fair report privilege applied as matter of law to newspaper article describing misdemeanor conviction for failing to file income tax returns as " 'tax fraud' " and " 'tax evasion' "].)

In arguing the newspaper article was not a fair and true report of the State Bar Court decision, Robertson makes three arguments. First, he contends the article "falsely

accused him of a crime" because Defendants "affixed the word 'Crime' in large font at the top of their article discussing Robertson's State Bar proceedings[.]"

We reject this contention. "[W]hen the alleged defamatory statement is contained in a headline, the headline must be read in conjunction with the entire article, and when so read the conclusion and inferences alleged by plaintiff must be supported." (*Balzaga v. Fox News Network, LLC* (2009) 173 Cal.App.4th 1325, 1338.) Having reviewed the entire article, we agree with the trial court that it "does not accuse plaintiff of a crime, and accurately reports that he was not charged with any crime [but] rather was disciplined by the State Bar after the verdict in a civil case."

Second, Robertson argues the newspaper article "falsely asserted that a jury had found that he had 'cheated' an elderly client out of money." Robertson faults the trial court for failing to properly consider evidence he submitted purporting to establish "the jury had rejected . . . finding that Robertson had defrauded Cartinhour, or had made material misrepresentations or omissions to Cartinhour, or had 'cheated' Cartinhour out of his investment in the partnership." Robertson also faults the trial court for failing to properly consider excerpts from the trial transcripts of the federal district court case.

Robertson's arguments are meritless. Although Robertson's cherry-picks from the record in the federal district court case, the question before us is not what occurred in the federal district court litigation, but rather whether the newspaper article accurately reports what occurred in the State Bar disciplinary proceeding and the federal case against Robertson. (*Kabateck*, *supra*, 7 Cal.App.5th at p. 434.) Having reviewed the article, there can be no question that it is a fair and true report.

The State Bar Court noted that "[o]n February 18, 2011, a jury found [Robertson] liable for legal malpractice and breach of fiduciary duty[.]" Among other findings, the State Bar Court found the "misrepresentations and omission of material facts made by [Robertson] reveal a well-implemented, well-thought out, and deviously orchestrated plan to defraud Cartinhour and misappropriate large sums of money, which he had induced Cartinhour to invest in the partnership." The State Bar Court concluded Robertson "committed acts involving moral turpitude, dishonesty or corruption," and

recommended his disbarment. The San Francisco Chronicle accurately summarized these findings, when it stated: "A State Bar judge has recommended disbarment of a Bay Area attorney after a jury found he had cheated an elderly client out of $3.5 million." Indeed, we are hard pressed to imagine how the article could have been fairer to Robertson: it not only accurately summarizes the State Bar Court's decision, but also reports on Robertson's disagreement with the decision.

Similarly, Robertson's challenge to the article's statement that the State Bar Court "suspended" him from practicing law is meritless. The State Bar Court ordered Robertson transferred to "involuntary inactive status," pending the Supreme Court's order imposing discipline. "An inactive member of the State Bar . . . is not entitled to practice law ([Business and Professions Code,] § 6006), and the involuntary enrollment of an attorney on inactive status thus operates as a temporary suspension from the practice of law." (*Conway v. State Bar* (1989) 47 Cal.3d 1107, 1111.) Thus, the newspaper's statement that Robertson was suspended "while he appeals [the State Bar judge's] recommendation" was entirely accurate. Robertson cannot prevail on the merits of his cause of action for defamation because the fair and true report privilege applies. (*J-M Manufacturing*, *supra*, 247 Cal.App.4th at p. 101.)

IV.

Judicial Notice and Evidentiary Objections

Robertson contends the trial court erred in taking judicial notice of the State Bar Court decision, and three other documents. We disagree. Citing *Brosterhous v. State Bar* (1995) 12 Cal.4th 315, Robertson contends the State Bar Court's decision is not an item that can be judicially noticed. Robertson's reliance on *Brosterhous* is unavailing. In *Brosterhous*, our Supreme Court declined to decide the propriety of taking judicial notice of materials that were not before the superior court. (*Id.* at p. 325.) But here, the State Bar Court decision was part of the record below. The trial court took judicial notice of jury instructions, the jury's verdict, the State Bar Court's decision, and a federal district court order for the purpose of determining whether Robertson was likely to prevail on his defamation claim. It was not improper for the trial court to do so. (*Sosinsky v. Grant*

(1992) 6 Cal.App.4th 1548, 1565 [not improper to take judicial notice of the fact "that the judge made a particular factual finding," even if it is improper to take judicial notice of the truth of those findings].)

Robertson also complains the trial court did not rule on his evidentiary objections to these court documents on the grounds of lack of authentication, lack of foundation, and lack of personal knowledge. Having considered Robertson's arguments regarding his evidentiary objections, we reject them.

DISPOSITION

The order granting the special motions to strike is affirmed. Defendants are entitled to costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

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Jones, P.J.

We concur:

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Simons, J.

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Needham, J.